Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

JOHN CARLETON, *et al.*,
Petitioners,

v.

CITY OF TULSA, OKLAHOMA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Tenth Circuit Court of Appeals erred in holding that this Court's decision in *County of Sacramento v. Lewis*, 118 S.Ct 1708 (1998), precluded a finding that Respondents Hanley and McSlarrow violated the petitioners' substantive due process rights.

II. Whether the Tenth Circuit Court of Appeals erred by holding that the petitioners could not maintain an action against the City of Tulsa for directly violating their substantive due process rights through the execution of the City of Tulsa's own policies, practices and customs without a finding that Respondents Hanley and McSlarrow individually violated the petitioners' constitutional rights.

III. Whether the petitioners produced sufficient proof to create a genuine issue of material fact with respect to whether the actions of the individual officers and/or the municipality violated the petitioners' substantive due process rights.

PARTIES TO THE PROCEEDING

Petitioner John Carleton is the natural father and personal representative of the estate of Angela Carleton. Petitioner John Carleton brought an action against the respondents pursuant to 42 U.S.C § 1983 in the District Court for the Northern District of Oklahoma for violations of Angela Carleton's constitutional rights. Petitioner Deborah Baughman also filed an action pursuant to 42 U.S.C § 1983 against the same respondents seeking to recover damages for the violation of her constitutional rights. Mr. Carleton and Ms. Baughman will hereinafter be referred to collectively as petitioners.

Petitioners' cases were consolidated in the U.S. District Court for the Northern District of Oklahoma. Petitioners were both appellants and appellees before the Tenth Circuit Court of Appeals.

Respondent City of Tulsa is a municipal corporation in the state of Oklahoma. Respondent City of Tulsa was a defendant in the district court proceedings and an appellee before the Tenth Circuit Court of Appeals.

Respondents Mike Hanley and Dan McSlarrow (hereinafter referred to solely as Hanley and McSlarrow) are police officers of the City of Tulsa. Hanley and McSlarrow were defendants in the district court proceedings. Hanley and McSlarrow also appealed the district court's ruling. Accordingly, Hanley and McSlarrow were both appellees and appellants before the Tenth Circuit Court of Appeals.

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PETITION FOR CERTIORARI

John Carleton, as personal representative of the estate of Angela Carleton, deceased, and Deborah Sturdivan Baughman respectfully petition for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

These separately filed actions were consolidated in the U.S. District Court for the Northern District of Oklahoma on January 26, 1995. On April 16, 1996, the District Court entered an Order granting the respondents' motion for summary judgment. (App. 11a-17a). On April 17, 1996, the District Court entered judgment in favor of the respondents. (App. 9a-10a).

The petitioners filed separate notices of appeal to the Tenth Circuit Court of Appeals on May 16, 1996. In addition, Hanley and McSlarrow filed separate notices of appeal to the Tenth Circuit on May 28, 1996. On June 11, 1996, the Tenth Circuit entered an Order consolidating the petitioners' and the respondents' cases for appellate purposes. (App. 7a-8a). On January 13, 1999, the Tenth Circuit issued its opinion, affirming in all respects the judgment of the District Court. (App. 1a). The Tenth Circuit's opinion is reported at 166 F.3d 1220 (10th Cir. 1999).

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the Tenth Circuit Court of Appeals and its judgment of January 13, 1999. Petitioners invoke the *certiorari* jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings

On November 8, 1992, Ms. Angela Carleton, age 22, was killed after the vehicle she was driving was hit by a vehicle being driven by a fourteen year old minor who was being

pursued by the City of Tulsa Police Department. Deborah Sturdivan Baughman, age 22, was a passenger in Ms. Carleton's vehicle and was seriously injured in the accident.

On November 4, 1994, John Carleton, personal representative of the Estate of Angela Carleton, filed a complaint against the City of Tulsa, Officer Mike Hanley, Officer Dan McSlarrow and Officer John Doe seeking to recover damages for the violation of Angela Carleton's substantive due process rights, and the violation of his own constitutional right to intimate familial association. On November 4, 1994, Deborah Baughman filed an action against the same defendants seeking to recover damages for the violation of her substantive due process rights. On January 26, 1995, the District Court entered an Order consolidating these cases.

On September 25, 1995, respondents filed a motion for summary judgment. On October 25, 1995, the petitioners filed a response to respondents' motion for summary judgment. On December 29, 1995, the petitioners filed the amended affidavit of Noah Goddard in opposition to the respondents' motion for summary judgment. On April 16, 1996, the District Court entered an Order granting respondents' motion for summary judgment and entered judgment in favor of the respondents on April 17, 1996. In its Order granting respondents' motion for summary judgment, the District Court held: 1) Hanley and McSlarrow were not entitled to qualified immunity; 2) Hanley's and McSlarrow's conduct did not rise to the level of a constitutional violation; and 3) because the actions of Hanley and McSlarrow did not rise to the level of a constitutional violation, the City of Tulsa could not be held liable. On January 13, 1999, the Tenth Circuit affirmed the District Court's ruling in all respects.

B. Statement of Facts

As respondents obtained a judgment as a matter of law, the facts shall be stated in the light most favorable to the petitioners. On November 8, 1992, Tulsa Police Officer Mike Hanley was assigned to a special armed robbery task force. At approximately 10:45 p.m., Hanley observed a blue station wagon with its bright lights on facing northbound at a red light at the intersection of Pine and N. Yale. Hanley testified that after the light turned green, the blue station wagon failed to yield the right of way and made a left hand turn in front of him. As a result of these actions, Hanley decided to follow the vehicle.

As the vehicle turned west on Pine, Hanley followed at a distance of approximately 30 feet. At that time, the speed of the suspect's vehicle was 30 to 35 miles per hour. Hanley activated his emergency lights and gave a short burst of his siren approximately a quarter of a mile from the intersection at Pine and N. Yale, but the suspect failed to stop.

While still on Pine, Hanley observed the make, model and the license plate number of the suspect's vehicle. However, Hanley did not write the tag number down or call it in to the dispatcher despite the fact that he had a pen and pad on his console for this purpose. While still on Pine and before getting to Harvard, Hanley again gave a short blast of his siren to signal the suspect to stop. However, the suspect again refused to stop. Instead, the suspect turned south on Harvard and accelerated his vehicle. At this point, Hanley concluded that the suspect was attempting to flee and Hanley activated his emergency equipment and began a high-speed pursuit of the fleeing suspect.

The suspect sped down Harvard with Hanley in hot pursuit. On Harvard, the suspect and Hanley crossed six major

traffic light controlled intersections before reaching 15th Street, to wit: 1) Independence; 2) East Admiral Place; 3) north of I-244, 4) south of I-244; 5) 4th Place; and 6) 11th Street. The speed limit on Harvard was and is 35 m.p.h. Between Harvard and Independence, Hanley testified that he pursued the suspect vehicle at approximately 50 miles per hour. Near Independence, Hanley admitted to seeing at least three other vehicles on Harvard.

Hanley continued the pursuit of the suspect to the next arterial crossing, Admiral Place. At the intersection at Admiral Place, the light was red. Hanley admitted that he suspected that the fleeing suspect might run the red light. However, Hanley intentionally continued the pursuit and both Hanley and the fleeing suspect ran through the red light. Despite these obvious dangers of this pursuit to the public, Hanley intentionally continued the pursuit of the suspect because the suspect "was eluding him." Hanley's supervisor, McSlarrow, testified that there was nothing preventing Hanley from terminating the pursuit after the fleeing suspect ran through this red light.

Despite the fact that Hanley testified that he recognized the danger of this pursuit to the public, Hanley continued the pursuit to the next major intersection on the north side of I-244. Between Admiral Place and the vicinity of I-244, there are three traffic lights in a four block area. During this portion of the pursuit, Hanley pursued the suspect vehicle between 50 and 60 m.p.h. Both the pursued vehicle and Hanley went through a green light on the north side of I-244. Significantly, Hanley testified that it was at this point that he realized that the suspect vehicle was not going to obey traffic signs and signals. Hanley further testified that he knew that other high speed pursuits had ended in death and serious bodily injury to innocent citizens.

Despite this knowledge, Hanley intentionally chose to

continue the pursuit to the next major intersection on the south side of I-244. As Hanley and the suspect approached the intersection, the traffic light turned red and the suspect vehicle and Hanley ran through the red light. As Hanley entered this intersection, a pickup truck attempted to cross Harvard on a green light. Hanley had to take evasive action to avoid hitting the pickup truck. Hanley admitted that after this incident with the pickup truck, he was aware that other traffic on the Tulsa roads would be exposed to danger if the chase continued. However, Hanley intentionally continued the chase because the suspect "was eluding him."

Hanley continued to chase the suspect through the next two intersections, Harvard and 4th and Harvard and 11th. Luckily, both Hanley and the suspect proceeded through these intersections on a green light.

The next major arterial intersection on the chase route was Harvard and 15th Street where the fatal accident occurred. Hanley estimated that the pursued vehicle reached speeds of 50 to 55 miles per hour between 11th and 15th Street. Hanley testified that there was no traffic on the roads and that the only other police officer involved in the pursuit was his supervisor, McSlarrow. However, the Official Oklahoma Traffic Collision Report directly contradicts Hanley's assertion that McSlarrow was the other officer involved in the pursuit and that there was no traffic in the pursuit route. The Traffic Collision Report lists the names of at least two other officers as participating in the pursuit and lists the names of six witnesses who were driving their vehicles in the pursuit route.

As the fleeing suspect reached the intersection of Harvard and 15th Street, he ran the red light causing a violent collision with the vehicle containing Ms. Carleton and Ms. Baughman. As a result of the collision, Ms. Carleton was killed and Ms. Baughman sustained serious injuries. Hanley

admitted that he slowed his vehicle down as he approached the intersection of Harvard and 15th Street because he saw the light was about to change. This clearly shows that Hanley had sufficient time to deliberate about the dangers of the pursuit and to take action designed to protect himself. At the time of the collision, Hanley was approximately 150 feet from the intersection of Harvard and 15th Street. The driver of the pursued vehicle was killed and later identified as Adrian Lee Grant, a 14 year old boy.

At no time during the chase did Hanley consider terminating the pursuit although he admitted that he had the power and opportunity to do so. Hanley's pursuit of the suspect went through seven major intersections, three of these intersections on red lights. In addition, Hanley himself was almost involved in a crash with a pickup truck as he sped through a red light. The petitioners submit that Hanley had the opportunity and time to deliberate and weigh the need for the immediate apprehension of the fleeing suspect versus the risks that the pursuit posed to the public at each intersection on the pursuit route. In fact, Hanley testified that he considered the risks versus the danger during the course of the pursuit and made a conscious decision to continue the pursuit after each intersection because the suspect "was eluding him." As previously noted, Hanley had sufficient time to slow his police cruiser to avoid becoming involved in an accident as the fleeing suspect entered the final intersection of this pursuit. As a result of Hanley's actions, Angela Carleton was killed and Deborah Baughman was seriously injured. It is incomprehensible that these serious injuries were sustained during the course of this pursuit as the sole reasons cited for the pursuit in Tulsa's Official Pursuit Report were traffic offenses, to wit: "Failed to Dim - 10-75 - F.T.Y.L.T. (Failure to yield, left turn)."

With respect to his prior pursuit activities, Hanley stated that he has never discontinued a pursuit or been told to

discontinue a pursuit by a supervisor. Hanley testified that he did not recall any supervisor ever giving him any information or guidance during the course of a pursuit.

In 1994, Sergeant Robert Joliff of the Tulsa Police Department analyzed the department's high speed pursuit policies and practices. Sgt. Joliff analyzed all reported high speed pursuits initiated by officers of the Tulsa Police Department from September, 1990 to August, 1992. During this period of time, Joliff reported that the Tulsa Police Department was involved in 357 vehicular pursuits and that two-thirds of these pursuits were initiated for traffic violations. The other third were initiated for "stolen vehicles," "suspicious vehicles" and to assist other law enforcement agencies. Joliff further found that 105 pursuits ended in accidents, 32 pursuits involved injuries and 3 pursuits involved fatalities. Joliff further found only 3 pursuits were found to have violated the high-speed pursuit policy. Significantly, no pursuits were found to violate the pursuit policy for failing to discontinue a pursuit because the danger of the pursuit outweighed the need for immediate apprehension.

In opposition to the respondents' motion for summary judgment, the petitioners submitted the affidavit of a police expert, Noah Goddard. Mr. Goddard testified that Hanley had poor justification for initiating the pursuit as the suspect was only suspected of traffic violations. More importantly, shortly after the pursuit began, it was apparent that the suspect was not observing traffic signals and that continuation of the pursuit created an unjustifiable risk of death or serious bodily injury to innocent third parties. As the pursuit occurred along a main thoroughfare in Tulsa where there were many traffic controlled intersections, the risk of death or serious bodily injury increased as the pursuit sped through each intersection. Mr. Goddard testified that the dangers created by this pursuit far outweighed the benefits to society of immediately

apprehending this suspect.

Mr. Goddard further testified that the City of Tulsa's vehicle pursuit policy was deliberately indifferent to the safety and well-being of members of the public because the policy left the decision of whether or not to pursue to the sole discretion of adrenalin-charged, emotionally driven officers who lack any objective means to evaluate the necessity of a high-speed pursuit. In addition, Mr. Goddard testified that the City of Tulsa Police Department had a widespread custom and practice of engaging in high speed pursuits when the dangers created by the pursuit were greatly outweighed by the need for the immediate apprehension of the suspect. Finally, Mr. Goddard testified that the City of Tulsa's pursuit training program was wholly inadequate for purposes of instructing officers when a pursuit should be initiated or terminated, especially in light of the department's pursuit fatality and injury record. Mr. Goddard stated that these policies, practices and customs of the City of Tulsa with respect to pursuit applications were deliberately indifferent to petitioners' rights and was a proximate cause of this tragedy.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WITH RESPECT TO WHETHER THIS COURT'S DECISION IN *COUNTY OF SACRAMENTO V. LEWIS*, 118 S.CT. 1708 (1998), APPLIES TO CASES INVOLVING INJURIES SUSTAINED BY INNOCENT THIRD PARTIES DURING THE COURSE OF HIGH SPEED PURSUITS OR IN CASES WHERE THE OFFICERS HAD THE OPPORTUNITY TO DELIBERATE DURING THE COURSE OF THE PURSUIT.

Prior to May of 1998, almost all Circuit Courts which considered the issue held that improper conduct by police officers during the course of a high-speed pursuit may, in some circumstances, violate an injured party's substantive due process rights. *See, e.g., Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir., en banc, 1994): *Temkin v. Frederick County Com'rs,* 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1172 (1992); *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986). In addition, the Circuit Courts also established that contact with the police vehicle is not required, and that police officers may be liable for injuries caused when the victim is struck by a fleeing suspect. *Fagan v. City of Vineland, supra*; *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992); *Temkin v. Frederick County Com'rs., supra*; *Boyle v. City Of Liberty, Mo.*, 833 F.Supp. 1436 (W.D. Mo. 1993). However, there was a conflict between the Circuit Courts regarding the proper standard to be applied in these cases. Some Circuits held that only conduct during the course of a pursuit which "shocked the conscience" could violate an injured victim's substantive due process rights. On the other hand, other Circuits held that conduct which was "deliberately indifferent" to the risks created by the pursuit could violate an injured victim's substantive due process rights.

As a result of this conflict between the Circuits, this Court granted *certiorari* in *County of Sacramento v. Lewis,* 118 S.Ct. 1708 (1998). On May 26, 1998, this Court rendered its decision in *Lewis.* In *Lewis*, police officers were called to the scene of a fight. *Id.* at 1712. Once on the scene, Officer Stapp observed a motorcycle approaching his police cruiser. The motorcycle was being driven by Brian Willard. Philip Lewis was a passenger on the back of the motorcycle. Neither boy had anything to do with the fight which prompted the officers to the scene. Officer Stapp turned on his emergency

lights and ordered the boys to stop. However, the motorcycle failed to stop and fled the scene. As a result of the motorcyclist's failure to stop, Officer Smith activated his emergency equipment and began a pursuit of the motorcycle. The pursuit of the motorcycle lasted only 75 seconds and covered a distance of only 1.3 miles. *Id.* The pursuit reached speeds of 100 miles per hour with the patrol car following as close as 100 feet. The chase ended after the motorcycle tipped over as Willard tried to negotiate a sharp left turn. Officer Smith slammed on his brakes, but was unable to stop his patrol car before it collided with Lewis, killing him instantaneously. *Id.*

As a result of the death of Philip Lewis, suit was brought against the officers involved in the pursuit and the County of Sacramento. The plaintiffs alleged that the high-speed pursuit of Philip Lewis violated his substantive due process rights. The district court granted the defendants' motion for summary judgment based on qualified immunity. However, the Ninth Circuit reversed, holding that "the appropriate degree of fault to be applied to high-speed pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security" and concluding that "the law regarding police liability for death or injury caused by an officer during the course of a high-speed chase was clearly established" at the time of the death of Philip Lewis. *Id.* at 1712. This Court granted *certiorari* and framed the question presented for resolution as follows:

> The issue in this case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. *Id.* at 1711.

This Court reversed the Ninth Circuit's holding that deliberate or reckless indifference to life during a high-speed pursuit of a fleeing suspect violates the substantive due process rights of the suspect and held that the proper standard to be employed in these cases is whether the conduct of the officer during the course of the pursuit "shocked the conscience." The precise holding of *Lewis* is as follows:

> Accordingly, we hold that high-speed chases with **no intent to harm suspects physically or to worsen their legal plight** do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983. *Id.* at 1720. (Emphasis added).

The petitioners submit that *Lewis* stands for the proposition that a **suspect** who is injured as a result of a police pursuit cannot state a claim for the violation of his substantive due process rights unless the officers engaged in the pursuit either "intended to harm the suspect" or "worsen the legal plight of the suspect." As the petitioners were **innocent third parties** and not suspects fleeing from police officers, the petitioners submit that *Lewis* is neither applicable nor controlling.

This argument was recently addressed by the U.S. District Court in Minnesota in *Feist v. Simonton*, -- F.Supp. --, 1999 WL 61888 (February 8, 1999). In *Feist*, the District Court noted:

> Plaintiff also argues that the holding of *Lewis* is inapplicable because the death was of an individual who was the object of the chase, rather than a third-party to the chase. As such, Plaintiff argues that the Court's analysis of the officers' "intent to harm the suspect or increase his legal plight" is not appropriate in a case in which the officers' threat vis-a-vis the

> general public is at issue. Although not directly addressed in this Order, this significant difference from the *Lewis* facts may well be an alternative ground to distinguish *Lewis*. *Id.* at 10, fn. 4.

As noted by the district court in *Feist*, the distinction between whether the injured party is the object of the pursuit or an innocent third party is significant. As *Lewis* held that pursuits with "no intent to harm suspects physically or to worsen their legal plight" do not give rise to liability, the petitioners submit that it is inapplicable to cases involving injuries to innocent third parties.

Further, petitioners submit that *Lewis* is inapplicable to the facts of this case because the primary officer involved in the pursuit had the time and opportunity to deliberate concerning the risks that the pursuit posed to the public. In fact, Hanley testified that he considered the dangers of the pursuit to the public before he proceeded through each intersection, but intentionally chose to continue the pursuit. Because Hanley actually considered the dangers of the pursuit and chose to continue it, petitioners submit that he should not be afforded the significant protections given to law enforcement officers' split-second decisions by this Court in *Lewis*.

In arriving at the standard to be applied in substantive due process police chase cases in *Lewis*, this Court borrowed the standard which it had applied in the context of prison riot cases, stating:

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the

> same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of a second chance.'... A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders. *Id.* at 1720.

In discussing the difficulties of balancing these competing obligations, this Court noted that "deliberate indifference" is an inappropriate standard to apply when "deliberation" itself is impossible. *Id.* at 1719. The petitioners submit that the facts of the *Lewis* decision readily demonstrate why the deliberate indifference standard was inapplicable. In *Lewis*, the officer drove his patrol car in pursuit of a motorcycle through a residential neighborhood, with little or no traffic on the road, for slightly longer than a minute, covering a distance of just over one mile. At the crest of a hill, the motorcycle skidded to a halt and was instantly stuck by the pursuing officer, killing the passenger riding on the back of the motorcycle. *Id.* at 1712. In holding that the officer's split-second decision to commence the chase did not "shock the conscience," this Court explained: "[the driver's] outrageous behavior was practically instantaneous, and so was [the officer's] instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to terrorize, cause harm, or kill." *Id.* at 1721. This Court has made clear that in cases involving split-second judgments, police officers must be given broad discretion to act.

However, the facts of the instant case present a far different factual picture. In Hanley's pursuit of the fleeing suspect, Hanley was initially engaging in the same type of

instantaneous judgments as the officer in *Lewis*. Hanley's initial decision to activate his lights and sirens was one made instantaneously. However, after Hanley made his initial decision to pursue, the degree of danger the pursuit posed to the public began to escalate. As this high-speed pursuit continued down a major Tulsa thoroughfare, the dangers of the pursuit increased at each major intersection. After the suspect began running through red lights at these major intersections, Hanley had the opportunity to balance the benefit to society of immediately apprehending the fleeing traffic offender against the danger that the pursuit caused to the general public. Each time that the suspect and officer sped through a major intersection presented a juncture for reassessment and evaluation of the escalating consequences of the chase. Rather than aborting the chase as the danger increased, the record is clear that Hanley made a conscious decision to continue the pursuit, exposing the members of the public to an increasing risk of death or serious injury. In fact, Hanley admitted that he assessed the risk of the pursuit to the public versus the need to immediately apprehend the suspect at each intersection, but intentionally chose to continue the pursuit because the suspect "was eluding him."

Because Hanley had the opportunity to deliberate over the risks of the pursuit and actually did deliberate, petitioners submit that the stringent standard announced in *Lewis* is not applicable. Petitioners submit that *Lewis* should only apply in situations where law enforcement officers do not have the opportunity for deliberation, not in cases where an officer actually deliberates and consciously chooses an action which exposes the public to an unjustifiable risk of death or serious bodily injury. The petitioners submit that the facts of this case clearly present a jury question regarding whether the individual officers violated the petitioners' substantive due process rights during the course of the pursuit.

The petitioners respectfully request that this Court accept their petition for writ of certiorari to settle this important question of federal constitutional law regarding the application and scope of this Court's decision in *Lewis*.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT IN THE CIRCUIT COURTS OF APPEALS REGARDING WHETHER A MUNICIPALITY CAN BE DIRECTLY LIABLE FOR VIOLATING AN INNOCENT THIRD PARTY'S CONSTITUTIONAL RIGHTS DURING THE COURSE OF A PURSUIT WHEN NO INDIVIDUAL OFFICER INVOLVED IN THE PURSUIT VIOLATED THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE INNOCENT THIRD PARTY.

Without conceding that the conduct of the individual officers did not rise to the level of a constitutional violation, the petitioners submit that a finding that the individual officers violated the petitioners' substantive due process rights is not a prerequisite to a finding of municipal liability. After ruling that Hanley and McSlarrow did not violate the petitioners' constitutional rights, the Tenth Circuit summarily dismissed the petitioners' municipal liability claims against the City of Tulsa. Petitioners submit that municipal liability under 42 U.S.C. § 1983 can be established even though the conduct of no one municipal employee may have violated a citizen's constitutional rights. If a municipality could not be liable unless there was a finding that an individual officer violated the constitutional rights of the citizen, a municipality would escape liability in precisely the circumstances where the municipality is most at fault. The petitioners submit such a result is inconsistent with the remedial and deterrent policies

of 42 U.S.C. § 1983.

In *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), this Court established that local governmental entities can be held liable under § 1983 for violating an individual's constitutional rights. *Id.* at 690. Shortly after *Monell*, the Supreme Court recognized that constitutional injury does not necessarily derive from the conduct of any one municipal employee. Instead, the Court has acknowledged the existence of "'systemic' [constitutional] injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." *Owen v. City of Independence*, 445 U.S. 622, 652 (1980).

To establish municipal liability under *Monell*, a plaintiff must show 1) the existence of a municipal policy or custom, and 2) that there is a causal link between the policy or custom and an alleged constitutional deprivation. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989). In a "failure to train" case against a municipality, a plaintiff bears the burden of proving that the municipality was deliberately indifferent to the risk of injury stemming from its failure to train. This Court stated in *City of Canton v. Harris, supra*:

> We hold today that the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to **deliberate indifference to the rights of persons with whom the police come into contact**.... [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been

deliberately indifferent to the need.[1] **In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury**. *Id.* at 388-390 (emphasis added).

Pursuant to *Canton*, when a municipality is deliberately indifferent to the risk of death or serious injury caused by its failure to train its officers, the municipality may be liable for any death or injury sustained at the hands of the municipality's untrained officers. In the instant case, the petitioners submit that given the obvious dangers of pursuits, municipalities are under a constitutional duty to provide their officers with pursuit training.

It is undisputed that a citizen's right to life is of constitutional dimension.[2] The petitioners submit that when

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[1] For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

[2] *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (fundamental interest in own life need not be elaborated on); *Cannon v. Taylor*, 782 F.2d 947, 949 (11th Cir. 1986) (right to life is of constitutional dimension); *Easterling v. City of Glennville*, 694 F.Supp. 911, 920 (S.D. GA 1986) (interest in life is of constitutional dimension).

the execution of a municipality's own policies, practices and customs causes a victim's death, the municipality is directly liable for violating the victim's Fourteenth Amendment right to life if the municipality was deliberately indifferent to the risk of death to the victim. In these circumstances, the cause of the constitutional violation need not be the actions of the individual officers, but the combined deliberately indifferent actions of the municipal policymakers. Accordingly, a municipality can be directly liable for violating a victim's constitutional rights even though no employee could be held individually liable for the violation.

However, pursuant to *Webber v. Mefford*, 43 F.3d 1340 (10th Cir. 1994), the Tenth Circuit held that the petitioners could not maintain an action against the City of Tulsa because it found that the conduct of Hanley and McSlarrow did not rise to the level of a constitutional violation. In *Webber*, the Tenth Circuit opined:

> Because Defendant Griffin did not violate Plaintiffs' constitutional rights, the district court correctly dismissed Plaintiffs' claims against the City of Sapulpa for inadequate training, supervision, and pursuit policies. A claim of inadequate training, supervision, and policies under § 1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation by the person supervised. *Id.* at 1344-1345.

However, this holding of the Tenth Circuit is in direct conflict with the holding of numerous other Courts of Appeals which have addressed this issue. The Third Circuit expressly rejected this analysis in *Fagan v. City of Vineland*, 22 F.3d

1283, 1292 (3rd Cir. 1994) (hereinafter referred to as *Fagan I*).[3] In *Fagan I*, three innocent third parties were killed by a fleeing suspect during the course of a high-speed pursuit. The district court found that the individual officers did not violate the plaintiffs' constitutional rights, and entered summary judgment for the municipality. *Id.* at 1291. However, the Third Circuit reversed. In *Fagan I*, the Third Circuit thoroughly discussed the interrelation between individual and municipal liability in substantive due process police pursuit cases, stating:

> We hold that in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution. Unlike in *Heller*, the plaintiffs in this case brought separate, independent constitutional claims against the pursuing officers and the City. These claims are based on different theories and require proof of different actions and mental states. The pursuing officers are liable under section 1983 if their conduct "shocks the conscience." *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir.1994) (en banc). **The City is liable under section 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiffs of life or liberty. A finding of municipal liability does not depend automatically or necessarily on the liability of any police officer.** Even if an officer's actions

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[3] It is important to note that there are two *Fagan* decisions. *Fagan I*, 22 F.3d 1283 (3rd Cir. 1994) and *Fagan II*, 22 F.3d 1292 (3rd Cir. 1994) (en banc). *Fagan II* was an en banc opinion in which the Court solely considered the applicability of the "shocks the conscience" standard to an officer's individual liability.

> caused death or injury, he can only be liable under section 1983 and the Fourteenth Amendment if his conduct "shocks the conscience." *Id.* The fact that the officer's conduct may not meet that standard does not negate the injury suffered by the plaintiff as a result. **If it can be shown that the plaintiff suffered that injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights. The pursuing police officer is merely the causal conduit for the constitutional violation committed by the City.** *Id.* at 1292. (emphasis added).

According to *Fagan I*, a municipality can be held directly liable for violating a victim's constitutional rights during the course of pursuits if the municipality is "deliberately indifferent" to the rights of the innocent third party even though the individual officer's conduct during the course of the pursuit does not rise to the level of a substantive due process violation. This opinion is in direct conflict with the Tenth Circuit's decision in *Webber, supra.*

The same result was reached by the Ninth Circuit in *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) and *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1991). In *Chew*, the Ninth Circuit held that "a city cannot escape liability for the consequences of established and ongoing departmental policy regarding the use of force simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers." 27 F.3d at 1444. The Ninth Circuit further held that a "jury could conceivably decide, for example, that although the officer's on-the-scene decision to use canine force was reasonable under the

circumstances, the city was nevertheless at fault for providing its officers with dogs trained to bite and seize all concealed suspects regardless of their efforts to surrender." 27 F.3d at 1445. The Ninth Circuit also held that there can be municipal liability without an underlying constitutional violation in *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992). In *Hopkins*, plaintiff's decedent was shot to death by a police officer who had a history of using excessive force and who had used his firearm inappropriately on several prior occasions. *Id.* at 884. With respect to the plaintiffs' municipal liability claim, the Ninth Circuit held that the "police chief and city might be held liable for improper training or improper procedure even if [Officer] Andaya is exonerated, since they put an officer on the street who is badly trained and instructed.... These facts would certainly bear on whether the city properly trained Andaya, and whether they should have sent him out on the streets carrying a weapon." *Id.* at 888.

Similarly, in *Parrish v. Luckie*, 963 F.2d 201 (8th Cir. 1992), the Eighth Circuit upheld a verdict against a municipality even though no individual officer was found liable holding that "[a] public entity or supervisory official may be liable under Section 1983 even though no government individuals were personally liable." *Id.* at 207 (citing *Salt Lake County*); *See also Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1172, 1177 (8th Cir. 1986) (upholding verdict exonerating individual defendants but finding municipality liable), *rev'd on other grounds*, 485 U.S. 112 (1988).

Other appellate court cases are in accord. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1519 (7th Cir. 1990) (Seventh Circuit refused to enter summary judgment in favor of municipality despite the fact no individual officer committed a constitutional violation); *Morgan v. District of*

Columbia, 824 F.2d 1049, 1055, 1063 (D.C. Cir. 1987) (D.C. Circuit upheld a finding of municipal liability in case in which all individual defendants were dismissed prior to trial, since the municipality's customs and policies in operating jail violated plaintiff's constitutional rights); *Hewitt v. City of Stanton,* 798 F.2d 1230, 1233 (9th Cir. 1986) ("The City could... be liable under *Monell*... even if [the individual officer] was exonerated, as long as [the officer] had, in fact, acted pursuant to municipal policy or regulation."); *Rivas v. Freeman*, 940 F.2d 1491, 1495-1996 (11th Cir. 1991) (holding the policy maker of the county liable for failing to implement proper identification procedures despite the fact that the arresting officers' conduct did not rise to the level of a constitutional violation).

As previously noted, this Court has also recognized that constitutional injuries do not necessarily flow from the conduct of any one individual and acknowledge the existence of "'systemic' [constitutional] injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith." *Owen*, 445 U.S. at 652.

By ruling that the City of Tulsa could not be independently liable for violating the petitioners' civil rights without a finding that the individual officers violated their constitutional rights, the Tenth Circuit failed to adhere to the principles of *Monell* and its progeny that a municipality should be liable when it is "at fault" or the "moving force" behind a constitutional violation. *See Monell*, 436 U.S. at 694; *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (*Monell* provided a "fault-based analysis for imposing municipal liability"). Pursuant to *Canton*, a municipality may be liable for violating the constitutional rights of a victim if the municipality is deliberately indifferent to the risk of injury to

the public caused by its failure to train its officers. The petitioners submit that this result is consistent with the "fault based" approach to municipal liability.

For example, if a municipality knows that its officers are performing inherently dangerous activities that pose a risk of death or serious bodily injury to the public such as police pursuits, petitioners submit that a municipality is under a constitutional duty to provide its officers with proper training to limit the risk of death or serious bodily injury to the public. Pursuant to the Tenth Circuit's ruling and interpretation of *Lewis*, an officer would only be liable for violating the substantive due process rights of an innocent third party if the officer had an "intent to injure" the third party. Whether the individual officer subjectively intended to injure the third party should not preclude a court's consideration of whether the municipality's own policies, practices and customs in failing to properly train, supervise and discipline its officers in pursuit applications was an independent cause of the petitioners' injuries. In other words, while municipal employees might not have had a subjective "intent to injure," they still may have inflicted constitutional injury by acting in accordance with municipal policies, practices and customs maintained in deliberate indifference to every citizen's right to life and personal security.

Under the Tenth Circuit's analysis, if the employee did not have the requisite "intent to injure," the court is prohibited from considering the causal role of a municipality's policies, practices and customs in bringing about the harm. The perverse effect of this analysis is that municipalities are relieved from liability when they are most at fault. The Third Circuit recognized this problem in *Fagan I*:

It is easy to imagine a situation where an improperly

> trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability [because he lacked the requisite culpability]. It does not follow, however, that the city should also escape liability. The city caused the officer to deprive the plaintiff of his liberty; the city therefore has violated the plaintiff's Fourteenth Amendment rights. *Fagan v. City of Vineland*, 22 F.3d at 1292.

In addition, the requirement of a finding of individual liability as a prerequisite to a finding of municipal liability has been harshly criticized by legal scholars. See Kritchevsky, Barbara, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 Geo. Wash. L. Rev. 417, 422, 459 (Jan. 1992) ("Such a result . . undermines Section 1983 by insulating municipalities from liability when they are most at fault -- when their policies and customs most directly cause their agents to violate constitutional rights... A requirement that municipal liability be derived from individual liability would undermine [Monell and its progeny] by immunizing municipalities from liability in many cases in which they were actually responsible for the violations.")

The petitioners submit that the Tenth Circuit erred in holding that the petitioners had to prove that the individual officers violated the petitioners' constitutional rights as a prerequisite to municipal liability. Given the sharp division between the Circuit Courts regarding this issue, particularly the contrary opinions of the Tenth and Third Circuits, the petitioners respectfully request that this Court grant their

petition for writ of certiorari to resolve the conflict among the Circuits on this important question of federal constitutional law.

III. PETITIONERS ADDUCED SUFFICIENT PROOF TO WARRANT SUBMITTING TO THE JURY THE QUESTION OF WHETHER THE INDIVIDUAL OFFICERS AND THE MUNICIPALITY VIOLATED THE PETITIONERS' CONSTITUTIONAL RIGHTS.

As set forth in the Statement of Facts, Hanley engaged in a high-speed pursuit of a traffic offender. During the course of this pursuit, Hanley and the suspect went through seven major intersections. At three of these intersections, Hanley and the fleeing suspect proceeded through red lights. At one intersection, Hanley was almost involved in an accident. Despite the increasing danger posed by this pursuit of a traffic offender, Hanley testified that he made a conscious decision at each intersection to continue the pursuit because the suspect "was eluding him." In addition, Hanley acknowledged that he knew that members of the public would be exposed to the significant risks of the pursuit as the pursuit crossed each major intersection. Petitioners submitted the affidavit of a police expert who testified that the actions of Hanley were inappropriate given that Hanley was pursuing for a traffic offense and the risk of this pursuit far outweighed the benefit to society of immediately apprehending this fleeing traffic offender.

As Hanley had the opportunity to deliberate about the consequences of his action and did in fact deliberate concerning the consequences of his actions, the petitioners submit that genuine issues of material fact exist as to whether Hanley violated the petitioners' substantive due process

rights.

In addition, the petitioners submit that the Tenth Circuit erred by holding that the petitioners could not maintain an action against the City of Tulsa without a finding that the officers involved in the pursuit violated the petitioners' substantive due process rights. As previously noted, there is considerable precedent from this Court and the lower courts which indicates that a finding of individual liability is not a prerequisite to a finding of municipal liability. In the case *sub judice*, the petitioners submitted considerable evidence that the execution of the City of Tulsa's policies, practices and customs was the moving force behind the harm to the petitioners.

In particular, the petitioners submitted substantial evidence concerning the City of Tulsa's policies, practices and customs with respect to pursuit applications. The report written by Mr. Joliff regarding the City of Tulsa's pursuit operations from September 1990 to August 1992, indicated that during that time period: 1) 357 pursuits were initiated; 2) 105 ended in accidents; 3) 32 ended in injuries; 4) 3 ended in fatalities; 5) 2/3 of the pursuits were conducted for minor traffic offenses; 6) 1/3 of the pursuits were conducted for stolen vehicles, suspicious vehicles or to aid other law enforcement agencies; 7) only three officers were disciplined for violating the pursuit policy; and 8) no officers were disciplined for failing to discontinue a pursuit when the risk to the public outweighed the danger to the public.

Petitioners' expert, Mr. Goddard, testified that the City of Tulsa's vehicle pursuit policy was deliberately indifferent to the dangers posed to users of the streets of the City of Tulsa during police pursuits. This policy left the decision of whether or not to pursue to the sole discretion of adrenalin-charged,

emotionally driven officers who then lack any objective means to evaluate the necessity of a police vehicle pursuit. In addition, the City of Tulsa Police Department has a widespread custom and practice of engaging in high speed pursuits when the danger created by the pursuit was greatly outweighed by the need for immediate apprehension of the suspect. Finally, the City of Tulsa's pursuit training program was wholly inadequate for purposes of instructing officers when pursuits should be initiated or terminated, especially in light of the department's pursuit injury and fatality record. Mr. Goddard stated that these policies, practices and customs of the City of Tulsa with respect to pursuit applications were deliberately indifferent to the lives and safety of the users of the streets of the City of Tulsa, and were a proximate cause of petitioners' injuries.

Accordingly, the petitioners respectfully submit that they presented sufficient evidence to create genuine issues of material fact with respect to whether the individual officers violated the petitioners' substantive due process rights. In addition, the petitioners respectfully submit that they presented sufficient evidence to create genuine issues of material fact with respect to whether the City of Tulsa's own policies, practices and customs directly violated the petitioners' constitutional rights.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed January 13, 1999]

JOHN R. CARLETON, Personal Representative of the Estate of Angela Nell Carteton, deceased, Plaintiff- Appellant,	)
and	)
DEBORAH STURDIVAN BAUGHMAN, Plaintiff,	)
v.	) No. 96-5130) (D.C. No. 94-C-1033-E)
CITY OF TULSA, OKLAHOMA, a municipal corporation, MIKE HANLEY; DAN MCSLARROW Corporal; JOHN DOE, Officer, Defendants-Appellees.	) (N.D. Okla.)

JOHN R. CARLETON, Personal Representative of the Estate of Angela Nell Carleton, deceased, Plaintiff-Appellee,	)
and	)
DEBORAH STURDIVAN BAUGHMAN Plaintiff,	)
v.	) No. 96-5140) (D.C. No. 94-C-1033-E)
CITY OF TULSA, OKLAHOMA, a municipal corporation, Defendant,	) (N.D. Okla.)
and	)
MIKE HANLEY; DAN MCSLARROW, Corporal; JOHN DOE, Officer, Defendants-Appellants.	)

DEBORAH STURDIVAN BAUGHMAN, Plaintiff-Appellant,	)	
v.	)	No. 96-5131 (D.C. No. 94-C-1034-E)
CITY OF TULSA, OKLAHOMA, a municipal corporation; OFFICER MIKE HANLEY, CORPORAL DAN MCSLARROW, OFFICER JOHN DOE, Defendants-Appellees.	)	(N.D. Okla.)
DEBORAH STURDIVAN BAUGHMAN, Plaintiff-Appellee,	)	
v.	)	No. 96-5141 (D.C. No. 94-C-1034-E)
CITY OF TULSA, OKLAHOMA, a municipal corporation, Defendant, and MIKE HANLEY; DAN MCSLARROW, Corporal; JOHN DOE, Officer, Defendant-Appellants.	)	(N.D. Okla.)

ORDER AND JUDGMENT*

Before TACHA, BARRETT, and MURPHY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

These consolidated appeals arise from suits brought by plaintiffs pursuant to 42 U.S.C. § 1983 involving a high speed police chase. The vehicle pursued by the police crashed into the vehicle driven by Angela Carleton. Ms. Carleton was killed, and her passenger, Deborah Baughman, was injured. Plaintiffs brought individual suits, which were later consolidated, against the officers involved in the chase and the City of Tulsa, alleging violation of plaintiffs' substantive due process rights as a result of the officers' reckless behavior and deliberate indifference to plaintiffs' constitutional rights and the City's failure to train the officers.[1]

The district court granted summary judgment in favor

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] Because the record on appeal does not contain the complaint or any of the summary judgment pleadings or briefs, we discern the nature of plaintiffs' allegations from their brief on appeal.

of defendants, finding that the officers' actions were not reckless and in complete indifference to risk, and, therefore, plaintiffs could show no violation of their constitutional rights. The district court also found that, because there was no constitutional violation by the officers, plaintiffs' § 1983 claims against the City must fail. Plaintiffs appeal the district court's ruling that defendants did not violate plaintiffs' constitutional rights, and the officer defendants cross-appeal the district court's refusal to grant them qualified immunity. Our review of the district court's grant of summary judgment is de novo, *see Kaul v. Stephan,* 83 F.3d 1208, 1212 (10th Cir. 1996), and we may affirm on any basis supported by the record, *see United States v. Sandoval,* 29 F.3d 537, 542 n.6 (10th Cir. 1994).

These appeals were informally abated pending this court's *en banc* decision in *Williams v. City and County of Denver,* No. 94-1190, 1998 WL 380518 (10th Cir. June 26, 1998), which was, in turn, abated pending the Supreme Court's decision in *County of Sacramento v. Lewis,* 118 S. Ct. 1708 (1998). *Lewis* governs the outcome of these appeals. In that case, the Court held that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Lewis,* 118 S. Ct. at 1720; *see also Radecki v. Barela,* 146 F.3d 1227, 1232 (10th Cir. 1998) (applying *Lewis* in holding that officer's exercise of instantaneous judgment in emergency situation did not shock the conscience and was, therefore, not actionable under § 1983), *petition for cert. filed,* 67 U.S.L.W. 3322 (U.S. Oct. 26, 1998) (No. 98-69).

Plaintiffs do not allege that the officers intended them

physical harm. Consequently, defendants' actions in the emergency situation surrounding the high-speed chase do not shock the conscience. There was no violation of plaintiffs' substantive due process rights necessary to maintain an action under § 1983. Because there was no constitutional violation, we do not reach the question of whether defendants are entitled to qualified immunity. *See Lewis, 118* S.Ct. at 1714 n.5. Finally, plaintiffs' § 1983 claim against the City must also fail because there was no constitutional violation by the officers. *See Webber v. Mefford,* 43 F.3d 1340, 1344-45 (10th Cir. 1994). AFFIRMED.

Entered for the Court

Deanell Reece Tacha
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 96-5130 & 96-5131

JOHN R. CARLETON, Personal Representative of the Estate of Angela Nell Carleton, deceased, DEBORAH STURDIVAN BAUGHMAN, Plaintiff - Appellants,	)
v.	)
CITY OF TULSA, OKLAHOMA, a municipal corporation; MIKE HANLEY; DAN MCSLARROW, Corporal; JOHN DOE, Officer, Defendants - Appellees.	)

ORDER
Entered: June 11, 1996

On the court's own motion, the above-captioned cases are consolidated. Consolidated brief on the merits shall be filed according to Federal Rules of Appellate Procedure and Tenth Circuit Rules. See 10th Cir. R. 31.1.

Entered for the Court

PATRICK FISHER, Clerk

By:
/s/_____
Opal A. Carter
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed April 16, 1996]

Case No. 94-C-1034-E
Consolidated Case No. 94-C-1033-E

JOHN R. CARLETON, Personal Representative of the Estate of Angela Nell Carteton, deceased, Plaintiff,

v.

CITY OF TULSA, OKLAHOMA, a municipal corporation, OFFICER MIKE HANLEY, CORPORAL DAN McSLARROW, and OFFICER JOHN DOE, Defendants.

AND

DEBORAH STURDIVAN BAUGHMAN
Plaintiff,

v.)
)
CITY OF TULSA, OKLAHOMA,)
a municipal corporation, OFFICER)
MIKE HANLEY, CORPORAL)
DAN McSLARROW, and)
OFFICER JOHN DOE,)
Defendants.)
_____)

JUDGMENT
Entered: April 17, 1996

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants City of Tulsa, Oklahoma, Officer Mike Hanley and Dan McSlarrow and against the Plaintiffs John R Carleton and Deborah Sturdivan Baughman. Plaintiffs shall take nothing of their claim. Costs and attorney fees may be awarded upon proper application.

IT IS SO ORDERED THIS 16th DAY OF APRIL, 1996.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed April 16, 1996]

Case No. 94-C-1034-E
Consolidated Case No. 94-C-1033-E

JOHN R. CARLETON, Personal Representative of the Estate of Angela Nell Carteton, deceased, Plaintiff,	)
v.	)
CITY OF TULSA, OKLAHOMA, a municipal corporation, OFFICER MIKE HANLEY, CORPORAL DAN McSLARROW, and OFFICER JOHN DOE, Defendants.	)
AND	)
DEBORAH STURDIVAN BAUGHMAN Plaintiff,	)
v.	)

CITY OF TULSA, OKLAHOMA, a municipal corporation, OFFICER MIKE HANLEY, CORPORAL DAN McSLARROW, and OFFICER JOHN DOE, Defendants.	)

ORDER

Entered: April 17, 1996

Now before the Court is the Motion for Summary Judgment (Docket # 16) of the Defendants Mike Hanley (Hanley), Dan McSlarrow (McSlarrow) and the City of Tulsa (City).

This case includes the consolidated claims of John Carleton as personal representative of the estate of Angela Nell Carteton, and Deborah Sturdivan Baughman. Plaintiffs bring these civil rights claims pursuant to 42 U.S.C. §§ 1983 and 1988, against the City of Tulsa and three of its police officers, claiming that the police officers, acting under color of law, recklessly instituted and recklessly continued without justifiable cause, a high speed chase which resulted in a collision between the pursued vehicle and a vehicle driven by Angela Carteton.[1] Plaintiffs claim that the city is liable because of failure to adopt or enforce proper police policies regarding vehicle pursuits, and failure to adequately train, test, or supervise officers regarding vehicle pursuits.

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[1] Angela Carleton was killed in the accident, and Baughman, a passenger, was injured.

The Defendants filed a motion for summary judgment, arguing that the officers are entitled to qualified immunity, that the officers were not reckless as a matter of law, and that the City had no policy or custom which deprived Plaintiffs' of their Fourteenth Amendment Due Process rights. In essence there are two issues: 1) whether the officers are entitled to qualified immunity in these circumstances; and 2) whether, as a matter of law, Plaintiffs can prove a violation of their constitutional rights.

Under qualified immunity, the officers are protected from personal liability unless the allegedly unlawful action was objectively legally unreasonable in light of legal rules that were clearly established at the time the action was taken. Chapman v. Nichols, 989 F.2d 393, 397 (10th Cir. 1993). Plaintiffs argue that the law is clearly established by Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992) that an officer could be liable for an injury caused not by the officer but by a suspect being chased by the officer, and that recklessness can give rise to a section 1983 claim based upon the due process clause. Plaintiffs note that Medina was decided prior to the accident at issue in this case.

Defendants argue that Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990), upon which the Medina court relied, merely "assumes" that reckless conduct could also form the basis for a due process violation. They argue that the Supreme Court case of Collins v. Harker Heights, 112 S.Ct. 1061 (1992) removes recklessness as a basis and requires conduct that is arbitrary or consciously shocking. The Court finds, however, that Collins does not support the City's assertion, and that it was clearly established, at the time of the accident in this case, both that recklessness could form the basis of a

due process violation and that an officer could be liable under section 1983 for an injury caused not by the officer but by a suspect being chased by the officer. See, e.g., Trigalet v. Young, 54 F.3d 645 (10th Cir. 1995).

The second relevant inquiry, however, is whether Defendants violated Plaintiffs' constitutional rights. Defendants argue that their conduct does not rise to the level of recklessness required by the Tenth Circuit in Webber v. Mefford, 43 F.3d 1340 (10th Cir. 1994) (recklessness requires wanton disregard or complete indifference to risk).

> [I]njuries suffered during an automobile accident do not amount to Fourteenth Amendment violations merely because the accident occurred in the context of a high-speed automobile chase by the police . . . . Rather, a police officer in a high-speed automobile chase violates a bystander's Fourteenth Amendment substantive due process rights only when the police officer displays reckless indifference to the risk created and directs his actions toward the bystander. Medina, 960 F.2d at 1496. 'An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to risk, for example 'when the actor does not care whether the other person lives or dies despite knowing that there is a significant risk of death' or grievous bodily injury.' Id. (Quoting Archie v. City of Racine, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc), cert. denied, 489 U.S. 1065, 109 S.Ct. 1338, 103 L.Ed. 2d 809

(1989).

Webber, 43 F.2d at 1343. "[R]eckless intent is established if the actor was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences." Medina, 960 F.2d at ____.

The undisputed circumstances of the pursuit are as follows: Officer Mike Hanley was on routine patrol on November 8, 1992 at approximately 10:45 p.m. when he observed a vehicle sitting northbound at a red traffic light at the intersection of Pine and North Yale. He followed the vehicle because the bright lights were on and because the driver made a left hand turn in front of him (failing to yield to Officer Hanley's right of way) onto Pine. While following the vehicle, he noticed the vehicle swerving, and decided to stop the vehicle because he suspected the driver was intoxicated. Although he activated his lights and siren, the vehicle did not stop. As the vehicle turned south on Harvard, the suspect accelerated away from Hanley, and Hanley followed, with his emergency lights and sirens activated. During the chase, both the suspect vehicle and officer Hanley ran several red lights, and traveled at maximum speeds of approximately 50 to 60 miles per hour. By the time the suspect vehicle reached 11th and Harvard, at least two other police cars were involved in the chase, and the accident involving Plaintiffs occurred at 15th and Harvard when the suspect vehicle hit the vehicle driven by Carteton.

In arguing that they did not act recklessly, Defendants point out that they "evaluated whether the need to apprehend a possible drunk driver outweighed the degree of danger

created by this pursuit", followed the suspect with emergency lights and sirens operating at speeds no more than twenty miles over the speed limit; never bumped, rammed or crowded the suspect; and drove with due care, slowing as they approached the intersection. The essence of Plaintiffs' argument is that it was reckless for the officers to have initiated the chase in the first place. In supporting this argument, Plaintiffs assert that the suspect was not running red lights and speeding until the chase began, and question whether the need to apprehend a possible drunk driver outweighed the degree of danger created by the pursuit.

Under the undisputed facts in this case, and the Authority of Webber and Medina, the Court concludes that the conduct of the officers in this case was not reckless. To pursue a suspected drunk driver with lights and sirens operating, with consideration given to pedestrians and other automobiles on the road, simply does not rise to the level of complete indifference to risk required by Medina. Thus, the Plaintiffs' cannot prove that Defendants violated their constitutional rights.

In light of this Court's finding that the Defendant officers did not violate Plaintiffs' constitutional rights, summary judgment is also appropriate in favor of the City. "A claim or inadequate training, supervision and policies under §1983 cannot be made out against a supervisory authority absent a finding of a constitutional violation by the person supervised." Webber, 43 F.3d at 1344-45.

Defendants' Motion for Summary Judgment (Docket #16) is granted.

IT IS SO ORDERED THIS 12th DAY OF APRIL, 1996.

/s/_____
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
JUN 14 1999
CLERK

(2)

No. 98-1654

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN R. CARLETON, *et al.*,
Petitioners,

v.

CITY OF TULSA, OKLAHOMA, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1998

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Tenth Circuit Court of Appeals erred in holding that this Court's decision in *County of Sacramento* v. Lewis, 118 S.ct. 1708 (1998), precluded a finding that Respondents Hanley and McSlarrow violated Petitioners' substantive due process rights.

II. Whether the Tenth Circuit Court of Appeals erred by holding Petitioners could not maintain an action against the City of Tulsa for directly violating their substantive due process rights through the execution of the City of Tulsa's own policies, practices and customs after the Court found Petitioners did not suffer a constitutional deprivation.

III. Whether the Petitioners produced sufficient proof to create a genuine issue of material fact with respect to whether the actions of the individual officers and/or the municipality violated the Petitioners' substantive due process rights.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request this honorable Court deny the petition for certiorari sought by the Petitioners seeking review of the decision denying them relief by the Tenth Circuit Court of Appeals.

OPINIONS BELOW

The opinions and orders previously entered in this action are appropriately set out in the Appendix to the Petitioners' petition.

THE PETITION FOR WRIT SHOULD BE DENIED

The purpose of the extraordinary remedy of certiorari is to offer a limited review of a cause that has been decided by the highest court of last resort before presentation to this Court. Certiorari should only be granted when the case under review clearly presents a situation indicative of unfair justice and that redress cannot be obtained through ordinary proceedings.

This Court has recognized the limited jurisdiction available by way of certiorari. Only fundamental questions of widespread importance should be considered:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished

> from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

The rules of this court also define the narrow limits of such review. "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. These rules set out the circumstances that must exist for a writ of certiorari to be granted.

In the present case, review is sought on two grounds set forth in Rule 10: 1) a United States court of appeal has entered a decision in conflict with another United States court of appeal on the same important matter, and 2) a United States court of appeal has decided an important question of federal law that has not, but should be, decided by this Court.

The Petitioner fails to satisfy the criteria traditionally applied by the Court in determining whether to grant a writ of certiorari. A review of the authorities reveals the decision of the Tenth Circuit is in accord with the decisions of this Court and other circuit courts of appeal.

I

THIS COURT'S DECISION IN *COUNTY OF SACRAMENTO V.* IS APPLICABLE TO THIRD PARTY CLAIMS.

Petitioners seek certiorari for a determination whether *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L.Ed.2d 1043 (1998), is applicable to other drivers or bystanders injured as a result of a police pursuit. Their argument that this issue has not been previously addressed by this Court is incorrect.

The *Lewis* Court reasoned that deference must be afforded to an officer's exercise of discretion in pursuit situations. The Court recognized the dilemma of officers who must make split-second decisions about whether to pursue, when it stated, "the police on an occasion calling for fast action have obligations that tend to tug against each other." In such emergency situations, one must examine an official's opportunity for meaningful deliberations. Those deliberations involve competing interests. *Lewis*, 523 U.S. 833, 118 S.Ct. at 1720. The Court went on to explain those competing interests:

> A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and on the other, the high-speed threat to everyone within stopping range, **be they suspects, their passengers, other drivers, or bystanders**. *Lewis,* 523 U.S. at 833, 118 S.Ct. at 1720. (emphasis added)

The Court did not define the duty of the pursuing police officer with specific reference to the suspect being pursued. Rather, the Court defined those duties in terms of the public generally.

The *Lewis* Court again chose not to distinguish between suspects and other citizens in its cite to *Checki v. Webb,* 785 F.2d 534, 538 (5th Cir. 1986),

> Where a citizen suffers physical injury due to a police officer's negligent use of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's intentional misuse of his vehicle. *Lewis,* 528 U.S. at ____, n. 13, 118 S. Ct. At 1720, n. 13.

Subsequent to *Lewis,* the Ninth Circuit found:

> As we read the Court's opinion [in Lewis], if a police officer is justified in giving chase, that justification insulates the officer from constitutional attack, irrespective of who might be harmed or killed as a consequence of the chase. *Onossian v. Block,* 1999 WL 330260, *2 (9th Cir. May 26, 1999).

Although Petitioners cite *Feist v. Simonson,* 36 F.Supp.2d 1136 (D. Minn. 1999), it offers little support for their position. In *Feist,* the plaintiffs argued that *Lewis* did not apply to injured third parties. The district court acknowledged the issue had been raised, but stated that it was not necessary to address it.

Every circuit court since *Lewis* addressing this issue has extended its reasoning beyond the pursuit of suspected criminals. See, *Onossian v. Block*, --- F3d ---, 1999 WL 330260 (9th Cir. 1999); *Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365 (9th Cir. 1998); *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998); *Medeiros v. O'Connell*, 150 F.3d 164 (2nd Cir. 1998); *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998).

II

THE CIRCUIT COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF THE *HELLER* DOCTRINE THAT MUNICIPAL LIABILITY ONLY EXISTS WHEN THERE HAS BEEN AN UNDERLYING CONSTITUTIONAL VIOLATION.

Petitioners assert there is a wide ranging conflict between the circuits regarding the direct liability of a municipality when a third party is injured but does not suffer a constitutional deprivation. Extant jurisprudence does not support this position.

This Court resolved the issue in *City of Los Angeles v. Heller*, 475 U.S. 796, 798-99, 106 S.Ct. 1571, 89 L. Ed. 2d 806 (1986). The *Heller* Court found a municipality could not be held liable under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 6ll, (1978), unless a person suffered a constitutional injury as the result of an officer's actions.

In *Heller*, issues pertaining to a policeman's individual civil rights misconduct were bifurcated for purposes of trial from a concurrent claim that the City of Los Angeles was

responsible for the officer's misconduct as a result of its police regulations. A jury was impaneled to determine the officer's liability. The jury determined that the officer had not violated the plaintiff's constitutional rights. Upon that finding, the trial court dismissed the concurrent claim against the City of Los Angeles, concluding that there could be no basis for the City's liability if the individual officer had not violated the plaintiff's constitutional rights. Reversal of this judgment by the Ninth Circuit Court of Appeals prompted a fairly blunt reinstatement of the trial court's decision by this Court:

> [T]his was an action for damages, and neither *Monell v. New York City Department of Social Services*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S.Ct. 2018 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point. *Heller,* 475 U.S. at 799.

In *Collins v. City of Harker Heights*, 503 U.S. 115, 124, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), the Court reiterated that an underlying constitutional violation must exist to impose liability on a municipality. Therein, the Court stated:

> The term [deliberate indifference] was used in the *Canton* v. *Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) case for the

> quite different purpose of identifying the threshold for holding a city responsible for the **constitutional torts committed by its inadequately trained agents**. *Id.* at 124. (emphasis added).

The Court went on to hold that since there was no underlying constitutional violation, liability could not be imposed upon the municipality under § 1983.

Every court of appeals decision except *Fagan v. City of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994)(panel opinion) is in accord with *Heller*. See, *Hayden v. Grayson*, 134 F.3d 449 (1st Cir. 1998); *Thomas v. Roach*, 165 F.3d 137 (2nd Cir. 1999); *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995); *S.P. v. City of Takoma Park, Md.*, 134 F.3d 260 (4th Cir. 1998); *Leatherman v. Tarrant County*, 28 F.3d 1388 (5th Cir. 1994); *Smith v. Thornberg*, 136 F.3d 1070 (6th Cir. 1998);; *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994); *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992); *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996); *Myers v. Oklahoma County Bd. Of Com'rs*, 151 F.3d 1313 (10th Cir. 1998); *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996).

Petitioners place great weight upon *Fagan*. The *Fagan* panel, in a two to one decision, departed from established precedent. That panel stated:

> We decline to follow four other courts of appeals, which have suggested that a municipality can be liable for failure to train only if one of the pursuing police officers violated the Constitution. See *Temkin v.*

> *Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir.1991), cert. denied, --- U.S. ----, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir.1989); see also *Medina v. City and County of Denver*, 960 F.2d 1493, 1499-500 (10th Cir.1992) (city can be liable if pursuing officers violate Constitution but escape liability because of qualified immunity); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364-65 (6th Cir.1993) (same), cert. denied, --- U.S. ----, 114 S.Ct. 1219, 127 L.Ed.2d 565 (1994). *Fagan*, 22 F. 3d at 1293.

The *Fagan* opinion has been criticized and rejected by other circuits.

In *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), the Court held that to prevail on a *Monell* claim, the plaintiff had to establish an underlying constitutional violation. The Court acknowledged the *Fagan* decision stating:

> Fagan attempts to distinguish *Heller* on the grounds that in *Heller*, the plaintiff was only seeking to hold the City of Los Angeles liable under a theory of respondeat superior. That cannot be the case since *Monell* expressly holds that there is no cause of action for respondeat superior liability against a municipal corporation under 42 U.S.C. Sec. 1983. *Monell*, 436 U.S. at 694-95, 98 S.Ct. at 2037-38. Thus we choose to follow the clear holding of Heller that "[i]f a person has suffered no constitutional injury at the hands of the individual police

officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *Heller*, 475 U.S. at 799, 106 S.Ct. at 1573. *Thompson*, 33 F.3d at 860, n. 11.

In *Evans v. Avery*, 100 F.3d 1033, (1st Cir. 1996) the Court stated at page 1039-1040:

> In *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir.1994) (panel opinion), the court stated that "in a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution." *Id.* at 1292. The court reasoned that the claim against the officers and the claim against the municipality were based on two different theories: the officers would be liable if their conduct "shocked the conscience," while the city would be liable if its policy makers, acting with deliberate indifference, implemented a policy that encouraged the officers to conduct an unsafe pursuit. *Id.* *Evans* invites us to adopt this analysis. We decline the invitation because we believe that the *Fagan* panel improperly applied the Supreme Court's teachings. . .
>
> The *Fagan* panel described the "deliberate indifference" test as a "different theor[y]" for municipal liability, 22 F.3d at 1292, but the "deliberate indifference" test is not an independent theory at all. Rather, deliberate indifference is merely an articulation of the

> second prong of the *Collins* framework, adapted to "policy and custom" cases. In treating it as a separate theory, the *Fagan* panel ignored the first segment of the framework: the requirement that the plaintiff's harm be caused by a constitutional violation. (citations omitted) Consequently, we follow *Heller's* clear rule and hold that the City cannot be held liable absent a constitutional violation by its officers. *Evans*, 100 F.3d at 1039-1040.

Another Third Circuit opinion has also criticized the rationale of the *Fagan* opinion. In *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995) the appeals court said:

> [T]he *Fagan* panel opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policy makers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the "deliberate indifference" prong of the *Collins* test, the panel opinion did not apply the first prong--establishing an underlying constitutional violation. *Mark*, 51 F. 3d at 1153, n. 13.

Petitioners set forth several cases they claim reach the same result as *Fagan*. However, those cases are distinguishable on their facts or have been misinterpreted by the Plaintiffs.

For instance, Plaintiffs rely heavily upon the cases of *Chew v. Gates*, 27 F.3rd 1432 (9th Cir. 1994) and *Hopkins v.*

Andaya, 958 F.2d 881 (9th Cir. 1991). In these cases the individual officers caused or could have caused a constitutional vioilation. In the present case, it has been determined that the individual officers did not violate the constitutional rights of the Petitioners.

In *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), the plaintiff cited *Chew* and *Andaya* for the proposition that a municipality could be held liable under §1983 notwithstanding a finding the individual defendants were found not to have committed a constitutional violation. The Ninth circuit rejected such an interpretation of those decisions. The *Quintanilla* Court found *Heller* dispositive and plaintiff had to show the individual officers violated his constitutional rights before the municipality could be held liable.

Plaintiffs also cite *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992). Citing *Heller*, the *Parrish* Court reiterated that municipal liability could not be imposed upon a finding that plaintiff's constitutional rights were not violated. *Parrish*, 963 F.2d at 207. The jury was required to answer special interrogatories. It made a finding the individual officer had violated the plaintiff's constitutional rights. In light of the jury's finding, the Court held municipal liability was not inconsistent. *Parrish*, 963 F.2d at 207.

The Eighth Circuit later examined *Parrish* in *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 (8th Cir. 1992). Finding the individual officers had not caused a constitutional violation, the *Robinson* Court held the municipality could not be held liable under §1983. The Court went on to say that, "Our recent decision in *Parrish v. Luckie* (citation omitted) is distinguishable because there the jury found that an officer had deprived plaintiff of her constitutional rights." *Robinson*, 972

F.2d at 977, n 3.

In support of their position, Petitioners claim the Eighth Circuit upheld a "verdict exonerating individual defendants but finding municipality liable" in *Praprotnik v. City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986) (Pet. Br. at 22). The Court in *Praprotnik* actually stated:

> *Heller* is, however, distinguishable from the present case. Crucial to the result in *Heller* was the fact that the city's liability, if any, was solely derivative of the conduct of the named individual defendant. *Id.* **Here, persons other than the named defendants, namely, Thomas Nash and Robert Killen, effected city policy in laying Praprotnik off and thereby brought to fruition Praprotnik's ultimate injury.** The failure of the jury to find the individual named defendants responsible for Praprotnik's damages can be justified by the fact that the named defendants were not the supervisors directly causing the lay off, when the actual damages arose. *Praprotnik*, 798 F.2d 1773, n. 3 (emphasis added)

The Petitioners next cite *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990). In *Gibson*, the appeals court reversed and remanded a decision in favor of the City because the plaintiffs did not have an opportunity to conduct discovery. The decision was based on the standards of Rule 12(b)(6). Later, in *Tesch v. County of Green Lake*, 157 F.3d 465 (7th Cir. 1997) the same court, citing *Gibson*, held that finding the individuals had not violated the plaintiff's constitutional rights precluded a finding of liability on the part of the government.

The appeals court stated:

> A failure to train theory or a failure to institute a municipal policy theory requires a finding that the individual officers are liable on the underlying substantive claim. *Tesch*, 157 F.3d at 477 (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1522 (7th Cir. 1990).

The only other case cited by Petitioners that addreesses the same issue is *Hewitt v. City of Stanton, 798 F.2d 1230 (9th Cir. 1986)*. The Petitioners quoted from page 1233 of *Hewitt*, "The City could . . . be liable under *Monell* . . . even if [the individual officer] was exonerated, as long as [the officer] had in fact acted pursuant to municipal policy or regulation." In so holding, the Ninth Circuit relied upon its decision in *Heller v. Bushey*, 759 F.2d 1371 (9th Cir. 1985). The viability of the *Bushey* opinion is doubtful in light of the fact the Supreme Court granted certiorari and vacated that judgment in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L.Ed.2d 806 (1986).

III

CERTIORARI IS NOT APPROPRIATE TO REVIEW AN ALLEGED MISAPPLICATION OF THE LAW.

Petitioners request this Court to exercise its jurisdiction as a means to reweigh the evidence of this case presented to the district court and to the Tenth Circuit. Supreme Court Rule 10 states that "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." As stated

earlier this Court has recognized that a writ of certiorari is granted to resolve issues important to the public. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Petitioners' third reason is of interest only to the parties involved in this matter. There is no reason to depart from established practice in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: June 14, 1999

Respectfully submitted,

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